



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Wright Associates, Inc.

File: B-238756

Date: June 12, 1990

S. Leo Arnold, Esq., Ashley & Ashley, for the protester.
Kirk Fordice, for Fordice Construction Company, an interested party.
Lester Edelman, Esq., Office of the Chief Counsel, Department of the Army, for the agency.
Paul E. Jordan, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. A bid on a total small business set-aside, indicating that not all end items to be furnished would be manufactured or produced by small business concerns, properly was rejected by the agency as nonresponsive.
2. Completion of plant and equipment schedule does not cure erroneous certification that not all end items will be manufactured or produced by a small business since schedule relates to responsibility, not responsiveness, of bidder and at best creates ambiguity as to bidder's intent.

DECISION

Wright Associates, Inc., protests the rejection of its bid as nonresponsive to the small business set-aside provision of invitation for bids (IFB) No. DACW38-90-B-0017, issued by the Vicksburg District, Army Corps of Engineers, for the casting of articulated concrete mattress squares used for river bank protection. Wright contends that its bid should be found responsive because its intent to comply with the requirement of the total small business set-aside was apparent from its bid.

We deny the protest.

Bidders were required to furnish separate prices for casting 98,000 concrete mattress squares (exclusive of the price of portland cement and fly-ash used to make the concrete),

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quantities of portland cement and fly-ash, and environmental protection. Casting of the squares was to be accomplished on a government-furnished field at Vidalia, Louisiana, using government-furnished steel forms. Each bidder also was required to certify whether it was a small business concern and whether all end items would be manufactured or produced by a small business.

Wright, the low bidder, certified that it was a small business concern. However, it interpreted the separate pricing requirements of the bid schedule to mean that portland cement, which it obtains from a large business, was an end item. Thus, it certified that "not all end items" would be manufactured or produced by a small business. According to the Corps, only the mattress squares are considered end items, and prices of cement and fly-ash are separately required to protect the bidder from economic harm if the government changes the amounts of these ingredients. Based upon Wright's certification, the contracting officer rejected its bid as nonresponsive and awarded the contract to the second-low bidder, Fordice Construction Company. Upon receiving notice of its rejection, Wright filed this protest.

A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. See Federal Acquisition Regulation § 14.301 (FAC 84-53); Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, Jan. 23, 1989, 89-1 CPD ¶ 58. The failure to complete the small business size status portion of the representation at issue here is a waivable minor informality. See Extinguisher Serv., Inc., B-214354, June 14, 1984, 84-1 CPD ¶ 629. However, the second portion of the certification concerning a bidder's obligation to furnish products manufactured or produced by a small business concern is a matter of bid responsiveness because it involves a performance commitment by the bidder. Rocco Indus., Inc., B-227636, July 24, 1987, 87-2 CPD ¶ 87. Where a bid on a total small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, the bid is nonresponsive and must be rejected; otherwise, a small business contractor would be free to provide the end items from either small or large businesses as its own business interests might dictate, thus defeating the purpose of the set-aside program. Id.

Here, Wright certified it was a small business, but represented it would not furnish all small business end items. Even though it now explains that the certification was based

upon its mistaken interpretation of cement as an end item, a nonresponsive bid cannot be made responsive based on explanations or other information furnished after bid opening. Rocco Indus., Inc., B-227636, supra. Thus, we agree that the contracting officer properly rejected Wright's bid as nonresponsive.

Wright, however, argues that there is sufficient information within its bid to establish that it intended to supply only end items produced or manufactured by itself, a small business. In support of its position, Wright relies upon its submission of an equipment and plant schedule which identified a 12-year old central mix plant and which stated, "all mat making equipment now stored at St. Francisville, Louisiana. This equipment made 450,988 mats in 1989 available for the project." Wright also observes that in accordance with IFB section H-21 ("Limitations on Subcontracting"), it was required to perform at least 50 percent of the cost of manufacturing, and in accordance with IFB section F.1 ("Commencement, Prosecution, and Completion"), it must set up the plant and other equipment prior to receiving the notice to proceed, and then produce 1,000 squares per calendar day. Since there would be insufficient time to dismantle the plant, set up another plant after completing 50 percent of the requirement, and still meet the contractual requirements, Wright argues that the combination of the limit on subcontracting and production requirements "clearly demonstrates" that Wright must produce all the end items using its own equipment, as indicated on the plant and equipment schedule. We disagree.

First, we do not find that this combination of solicitation requirements and Wright's plant schedule establishes its intent to supply only small business end items. While the schedule identifies the mix plant, it does not identify it as Wright's equipment. Further, even to the extent it is accepted as Wright's property, we have held that such schedules deal with matters of responsibility and are subject to change without affecting a bid's responsiveness. See Great Lakes Dredge & Dock Co., B-221768, May 8, 1986, 86-1 CPD ¶ 444. Thus, we do not agree that merely listing the plant establishes an obligation on Wright to use it. See Delta Concepts, Inc., 67 Comp. Gen. 522 (1988), 88-2 CPD ¶ 43 (completion of place of performance clause does not cure failure to certify that all end items will be produced by a small business). Similarly, while logistical problems appear to surround substitution of a subcontractor which would use different equipment, nothing would appear to prevent the substitution of a contractor which would use the equipment first set up by Wright, allowing production to continue unabated. Thus, we do not find Wright's additional

agreement not to subcontract more than 50 percent of the cost of manufacturing, in conjunction with its schedule and performance requirements establish its intent only to supply small business produced end items.


Second, assuming, for the sake of argument, that Wright's schedule and other agreements established an intent compliant with the small business requirements, Wright's bid would be, at best, ambiguous since it contains a specific certification that Wright will not be supplying small business products, as well as apparent contradictory statements that in fact it, as a small business, will produce all the end items. Where a bid is subject to two reasonable interpretations, under one of which it is nonresponsive, the bid is ambiguous and must be rejected. Propper Mfg. Co., Inc.; Columbia Diagnostics, Inc., B-233321; B-233321.2, supra, citing, Discount Mach. & Equip., Inc.--Request for Recon., B-223048.2, July 1, 1986, 86-2 CPD ¶ 5.

In this regard, Wright's reliance on two of our prior decisions is misplaced. In B-156852, June 9, 1965, we permitted the acceptance of bids where the bidders neglected to include in their bids the small business certification at issue here, but where information in the bids as submitted made it possible to ascertain the bidders' intention to supply small business produced end items. See also Mechanical Mirror Works, Inc., B-210750.2, Oct. 20, 1983, 83-2 CPD ¶ 467, which cites B-156852. Unlike the situation in B-156852, and Mechanical Mirror, where there was no certification, Wright plainly represented that it would not supply small business manufactured end items. Thus, as stated above, Wright's representation at best created an ambiguity requiring rejection of its bid as nonresponsive.

Our conclusion is not changed by the fact that Wright has been awarded five prior contracts by other Corps districts for the same type of supplies, even though it completed the small business certifications in those successful bids the same way it did for this procurement. Wright argues that its completion of all five prior contracts by itself, using its own equipment, further evidences its intent to do so if awarded the instant contract. To the extent Wright's prior successful bidding and performance indicate its intent to comply with the small business requirements, its bid remains ambiguous, and thus nonresponsive in view of its plain representation to the contrary. Moreover, the erroneous acceptance of Wright's prior certifications does not require the agency to continue to make the same mistake. See Gartrell Constr., Inc.; U.S. Floors, Inc., B-237032; B-237032.2, Jan. 11, 1990, 90-1 CPD ¶ 46.

We do find it disturbing that some Corps districts appear not to understand the meaning of certifications in small business set-asides or to have failed to review the contents of those certifications. We suggest that the Corps apprise all its districts of the proper interpretation of small business certifications.

The protest is denied.



for
James F. Hinchman
General Counsel